Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

October 2004

Courts are split on retroactivity of statute subjecting employer to liability for harassment by third party. After the decision by the Court of Appeal holding that an employer could not be liable to an employee for preventing harassment by clients or customers, the legislature, amended *Gov. Code* § 12940 (j) (1) expressly providing that an employer may be liable for sexual harassment by a non-employee. Last March, in *Salazar v. Diversified Paratransit Inc.* (2004 as mod. April 6, 2004) 117 Cal.App.4th 318, [11 Cal. Rptr. 3d 360, 2004 DJDAR 3960], the Second District held that the amendment was merely declarative of existing law and should therefore be applied retroactively. A panel in the Fourth District disagreed. *See, Carter v. California Department of Veterans Affairs* (Cal. App. Fourth Dist. Div. 2, August 17, 2004) 121 Cal.App.4th 840, [2004 DJDAR 10147] held that retroactive application would violate due process.

Note: It is probable that the case will go to the California Supreme Court to resolve the conflict between the districts. Meanwhile, remember that, whether your case is in the second or the fourth district, California trial judges, as distinguished from federal trial judges, may follow either precedent; they are not bound to follow precedent just because it is in their district. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.

Once a court loses jurisdiction, it cannot change its rulings. In *Jerred H. v. Contra Costa County Children and Family Services Bureau* (Cal.App. First Dist., Div. 3, August 16, 2004) 121 Cal.App. 4th 793 [17 Cal. Rptr. 3d 481, 2004 DJDAR 10131], an adolescent dependent petitioned the court to reverse its prior ruling terminating parental rights. The termination order had been issued more than eight months before the petition was filed and thus, was final, no appeal having been filed. Although changed circumstances might have warranted the reversal, the trial court concluded it lacked jurisdiction to do so and (regretfully) denied it on that basis. The Court of Appeal affirmed, sharing in the conclusion that this was a harsh result and suggesting legislation be enacted to change the rule "under very limited circumstances."

Note: The harshness of the result might be reduced if the parent whose rights had previously been terminated sought to adopt the minor.

Lawyers may contact directors of represented corporations. As long as the directors' own lawyers permit the contact, *California State Bar Rules of Professional Conduct*, rule 2-100, prohibiting communication with represented opposing parties, does not prohibit the contact. This is so, even though the lawyers for the corporation object. (*La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court* (Cal.App. Fourth Dist., Div. 1, August 16, 20004) 121 Cal.App. 4th 773, [17 Cal. Rptr. 3d 467 2004 DJDAR 10137.]

The right to sexual privacy is not absolute. The second district, in an opinion by Justice Flier held that the right to privacy, protected under the *California Constitution*, is not absolute. In an action where a wife sued her husband, alleging he had infected her with HIV, the court ordered, disclosure of the husband's medical records and details of his sexual background in response to discovery demands. But the court agreed with the defendant that the right to sexual privacy entitled him to refuse to disclose the identity of his sexual partners. (*John B. v. Superior Court* (Cal. App. Second Dist., Div. 8, August 23, 2004) [2004 DJDAR 121 Cal. App. 4th 1000 10515].

There are exceptions to the rule that hiring an opponent's expert will result in disqualification. Cases have held that an attorney who retains an expert previously consulted by the opposing side may be disqualified. (*See, County of Los Angeles v. Superior Court*

Litigation Section Events

Section Education Institute

January 28–30, 2005
Palace Hotel
San Francisco, CA

See Website for Details:
www.calbar.ca.gov/SEI

Annual Trial Symposium

April 15–17, 2005
Silverado Country Club and Resort
Napa Valley, CA

Details Available on Website Soon

Discussion Board Participation

We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion. Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: www.Calbar.ca.gov to explore the new bulletin board feature—just another benefit of Litigation Section membership.

(1990) 222 Cal.App.3d 647; and *Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial* ¶ 1:95.) But where the lawyer subsequently retaining the expert did not know of the prior relationship, the expert had ceased all contact with the opponent, and no confidential information had passed to the subsequent lawyer, it was error to disqualify the lawyer. (*Collins. v. State of California* (Cal. App. Third Dist., August 25, 2004) 121 Cal. App. 4th 1112 [2004 DJDAR 10585].

American Arbitration Association rules permitting the association to rule on disqualification of arbitrator violates statute. The AAA's Construction Industry Arbitration Rules provide that, if a party objects to an arbitrator, AAA decides whether the arbitrator is disqualified. Plaintiff, demanded disqualification of the arbitrator; AAA determined there was no good cause for disqualification and the trial court ruled that, by agreeing to arbitrate under AAA's rules, plaintiff waived its rights to disqualify the arbitrator under the provisions of the California Arbitration Act. (*Code Civ. Proc.*, §§ 1280 et seq.) The Court of Appeal reversed, holding that a party to a contract providing for arbitration cannot contractually waive the right to disqualify the arbitrator based on lack of neutrality. *Azteca Construction, Inc. v. ADR Consulting, Inc.* (Cal. App. Third Dist., August 25, 2004; as mod. September 9, 2004) 121 Cal.App.4th 1156, [2004 DJDAR 10648].

Must an anti-SLAPP motion be "heard" within 30 days of service of the motion? Or is it sufficient that it be "noticed" to be heard within that time period? The anti-SLAPP statute (*Code Civ. Proc.*, § 425.16) provides that a motion under the statute must be filed within 60 days of service of the complaint, absent judicial permission, and requires the motion to be "noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing." In *Decker v. U.D. Registry*, Inc. (2003) 105 Cal.App.4th 1382, [129 Cal. Rptr. 2d 892] the court held that the court lacked jurisdiction to hear a motion noticed for hearing beyond the 30-day limit where there was no showing concerning docket conditions. In *Fair Political Practices Commission v. American Civil Right Coalition, Inc.* (Cal. App. Third Dist., August 26, 2004) 121 Cal. App. 4th 1171, [2004 DJDAR 10684] defendant's notice of motion had similarly provided for a hearing date beyond the 30-day limit and, the court, relying on *Decker*, held that the trial court properly denied the motion. But the court used language indicating that the motion must be heard within the 30-day time limit.

Note: *This is not what the statute says.* There is nothing in the language of the statute that would prohibit the court from continuing the hearing on the motion beyond the 30-day time limit as long as it was properly noticed to be heard within that period.

Note: Under both *Decker* and *Fair Political Practices Commission* where the motion cannot be noticed with 30 days of service because of the court's docket conditions (*e.g.*, the department requires that a date be reserved and the clerk refuses to give a date within 30 days), the burden is on the moving defendant to so indicate. We suggest that this be done *in the moving papers* by including a factual declaration by the person who learned that the court would not permit the motion to be heard within the prescribed time period. This will provide the evidence the appellate court would need to accept the exception to the 30-day rule.

Compliance with Hague Convention may not be enough to effect service. In our May newsletter we reported that in *Brockmeyer v. May* (9th Cir., 2004) 361 F.3d 1222, (withdrawn June 28, 2004) [2004 U.S. App. LEXIS 12910], the Ninth Circuit held that service by an American plaintiff on an English defendant by regular mail to a post office box was valid. But there is a twist. In *Brockmeyer v. May* (9th Cir. August 31, 2004) [2004 U.S. App. LEXIS 18349, 2004 DJDAR 10802] the same Circuit held that, although the Hague Convention does not prohibit service by mail if permitted by the laws of the recipient's country, the process must also meet the service requirements of *Federal Rule of Civ. Proc.*, Rule 4.

Settlement agreement entered into as part of mediation is not privileged. In our September newsletter we cited *Rojas v. Superior Court* (Coffin) (July 12, 2004) 33 Cal.4th 407, [93 P.3d 260, 15 Cal. Rptr. 3d 643] wherein our Supreme Court held that all materials prepared in connection with a mediation were absolutely privileged under *Evid. Code*, § 1119. But *Fair v. Bakhtiari* (Cal. App. First Dist., Div. 2, August 31, 2004) [2004 Cal. App. LEXIS 1432, 2004 DJDAR 10773] recognized an exception under *Evid. Code*, § 1123, holding that a settlement agreement entered into during the mediation was admissible, as long as it reflected the intention of the parties that it be enforceable and binding.

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Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com